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ABSTRACT

Because Native American societies are held by United States courts to possess rights of self-government where these rights have not been explicitly withdrawn, the constitutions of 280 Native American governments in the United States (exclusive of 219 in Alaska) were examined as they existed in September 1981 to determine the extent and character of provisions dealing with civil liberties. Findings showed that, in addition to including general provisions for civil liberties and incorporating the Indian Civil Rights Act of 1968, many tribal constitutions also listed specific rights (First Amendment rights, guarantees of equality, protection for property rights, due process of law, discrimination by gender, rights of the accused) which members and/or other persons have against tribal governments. However, the number of such specific rights was less for almost all tribal constitutions than for the United States Constitution. It is recommended that Native Americans seriously study how to strengthen constitutional protection for individual liberties without undermining tribal self-government, survey the state of civil liberties on reservations today, develop remedies beyond the writ of habeas corpus for civil liberties violations, and consider the use of the Bureau of Indian Affairs as trustee for tribes to protect the civil liberties of individuals. (NEC)

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BILLS OF RIGHTS IN TRIBAL CONSTITUTIONS

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Native American societies are held by the courts of the United States to possess rights of self-government where these rights have not been explicitly withdrawn by Congress. This most fundamental principle of Indian law is stated by Felix Cohen in the following way:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, i.e., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

One of the important consequences of this principle has been that the federal courts have held, with few exceptions, that the Bill of Rights does not operate as a restraint on tribal governments unless Congress has explicitly held to the contrary. For example, in the case of Talton v. Mayes in 1896, the United States Supreme Court held that the Fifth Amendment was not a limitation on tribal governments. The Thirteenth Amendment to the federal Constitution, outlawing slavery, was held to apply against tribal governments because it is an absolute ban on slavery, applicable against all governments and persons in the United States.

In 1959, the 10th Circuit Court of Appeals ruled that the First Amendment protections for religious freedom were not restraints on tribal action. In 1965, the 9th Circuit Court of Appeals ruled that a federal court had jurisdiction to issue a writ of habeas corpus against a tribal council; although the court did not rule on the merits of the case, it expressed doubt about the "present validity" of the proposition that "the Constitution applies to the Indians, in the conduct of tribal affairs, only when it expressly binds them, or is made binding by treaty or act of Congress."

In 1968, following seven years of hearings held by a subcommittee of the Senate Judiciary Committee headed by Senator Sam Ervin (Democrat of [redacted] North Carolina) the Congress passed the Indian Civil Rights Act, as part of the Civil Rights Act of that year. The act contained the following provisions relevant to this question, in addition to a section defining "Indian tribe," "powers of self-government," and "Indian court," and several other sections applying to tribes.

Section 202 of Title II states that

> No Indian tribe in exercising powers of self-government shall
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> (3) subject any person for the same offense to be twice put in jeopardy;
>
> (4) compel any person in any criminal case to be a witness against himself;
>
> (5) take any private property for a public use without just compensation;
>
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> (9) pass any bill of attainder or ex post facto law; or
>
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Section 202 in effect applied the protections for civil liberties contained in various parts of the federal Constitution to individuals subject to tribal governments, with the following principal exceptions:

1. the prohibition of an "establishment of religion" was not included because it was recognized that this would destroy certain Native governments with a theocratic structure;

2. The right to be indicted only by a grand jury was omitted;

3. The guarantee of a jury trial was provided only for offenses "punishable by imprisonment" and the number of trial jurors guaranteed was only six;

4. Tribal punishments were limited to imprisonment for six months and/or a fine of $500;

5. The right to counsel was provided only at the defendant's expense.

Section 203 of Title II provided that "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Section 301 of Title III directed the Secretary of the Interior to develop, by July 1, 1968, a "model code to govern the administration of justice by courts of Indian offenses on Indian reservations." Such a code was required to include provisions to "(1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense" and to "(2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual ..."

The ultimate effect of Section 301 remains unclear. The Department of the Interior has not yet developed the model code required by the section. On its face, the section means that the model code will apply only to Courts of Indian

Offenses, which are no longer very numerous in Indian country; most courts are established under the authority of tribal constitutions. However, the Supreme Court, in a footnote of Santa Clara Pueblo v. Martinez, suggested that "Although S 1311 by its terms refers only to courts of Indian offenses, ... the Senate Report makes clear that the code is intended to serve as a model for use in all tribal courts." If this is the case, such a code could be the means for a general upgrading of rights of the accused. However, tribes cannot be compelled to accept such a model code. Furthermore, it is not clear what the meaning of "the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States ..." is. The question here is the extent to which court-determined elaborations of basic constitutional guarantees must be included in such a code. This is an important issue, since tribal courts are much more informal institutions than state or federal courts, and would have to change substantially to attain the same degree of formality as other courts in this country.

There has been substantial litigation under the Indian Civil Rights Act. Several issues have been raised and/or decided by this litigation. In 1969, a federal District Court in Arizona concluded that persons who were non-members of the tribe were protected by the Act. Courts disagreed about whether the Act authorized challenges to tribal determination of membership, an area hitherto free from judicial determination. Two closely interrelated points produced conflicting decisions until the decision of the United States Supreme Court in Santa Clara Pueblo v. Martinez. One was the question whether the Indian Civil Rights Act, by implication, eliminated the immunity from suit previously enjoyed by tribal governments absent any specific authorization for such suits by Congress or a treaty. The other major question was the nature of the remedies available to persons challenging tribal actions under the Act. The extreme position in one

direction was taken by the American Civil Liberties Union, which argued in an amicus curiae brief before the United States Supreme Court that, by implication, the Act had incorporated all of the remedies available to the federal courts for redressing violations of rights by state and federal courts. The extreme position in the other direction was that, since the only remedy specifically mentioned in the Act was the writ of habeas corpus, this was the only remedy available.

Santa Clara Pueblo v. Martinez decided, in 1978, that Congress had not intended to eliminate the traditional immunity from suit of tribal governments; the same case also decided that habeas corpus was the only remedy available under the Act. The Court based these findings on several assertions. First, it cited evidence from the extensive hearings which led to the Act that Congress had had in mind in passing the Indian Civil Rights Act not only protecting the rights of individuals but also protecting the Native right to self-government. The Court said that "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'" Evidence cited to support this conclusion included the facts that the Act had not made blanket application of the Bill of Rights to tribal governments, although this had been the approach at first suggested by Senator Ervin. Instead, the Act had "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments."

Further, other parts of the Act, such as provisions requiring tribal consent for the assumption by states of jurisdiction over reservations and provisions for strengthening tribal courts, supported this interpretation, Consequently, the Court concluded, "Creation of a federal cause of action for the enforcement of

rights created" by the Act "plainly would be at odds with the congressional goal of protecting tribal self-government" because such an interpretation would not only "undermine the authority of tribal forums" but would also "impose serious financial burdens on already 'financially disadvantaged' tribes."

Second, the majority concluded (although this conclusion was disputed in a dissent by Justice White) that the "specific legislative history" of the Act supported the conclusion that habeas corpus was the only remedy contemplated. In support of this conclusion were cited the facts that the original proposal by Senator Ervin had included a provision for de novo review by federal district courts of all convictions in tribal courts but that this had been rejected on the ground that it would undermine tribal sovereignty, that proposals to allow the Attorney General or the Secretary of the Interior to act on complaints of civil liberties violations were considered and rejected, and that Congress had concluded that "the most serious abuses of tribal power had occurred in the administration of criminal justice."

Third, the absence of other remedies than habeas corpus available to the federal courts did not mean that there were no other means of upholding individual rights against tribal governments. The Court pointed out that "Tribal forums are available to vindicate rights created by the ICRA, and [the ICRA] has the substantial and intended effect of changing the law which these forums are obliged to apply."

Further, in a footnote it was suggested that, where tribal constitutions provide that tribal ordinances can not take effect without approval by the Department of the Interior, "persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of Interior."

Santa Clara Pueblo v. Martinez recognized that Congress has the authority to "authorize civil actions for injunctive or other relief to redress violations of S 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." however, in the absence of such action, and so far Congress has shown no desire to amend the Indian Civil Rights Act in this direction, the principal responsibility for enforcing the Act lies with tribal governments. This paper deals with one aspect of this situation; the provisions in written tribal constitutions dealing with civil liberties are examined to determine the extent of such provisions and their character. The paper will end with some speculation about the future of both civil liberty against tribal governments and the survival of Native self-government.

All of the written documents comprising the constitutions of Native American governments in the United States, exclusive of those in Alaska, were examined as these existed in September, 1981. The Bureau of Indian Affairs counted, as of July 21, 1981, 280 federally recognized Indian entities (exclusive of 219 in Alaska), in three categories:

Officially Approved Indian Organizations Pursuant to Federal Statutory Authority (Indian Reorganization Act or Oklahoma Indian Welfare Act) 154

Officially Approved Indian Organizations Outside of Specific Federal Statutory Authority 55

Traditional Indian Organizations (Recognition Without Formal Approval of Organizational Structure) 71

A classifiecation by whether or not the Native American society has a written constitution plus also the nature of that constitution produces the following totals:

Written constitutions adopted under the authority of the Indian Reorganization Act 129

Written constitutions adopted under the authority of the Oklahoma Indian Welfare Act 24

Written constitutions not adopted under authority of any federal statute	63
Written constitutions embodied in state statutes	2

Basic Principles

A few constitutions state basic theories of constitutional government, in preambles or elsewhere. For example, Article IV of the Constitution of the Gila River Indian Community of Arizona states that

> All political power is inherent in the people. Governments derive their powers from the consent of the governed, and are established to protect and maintain individual rights.
>
> A frequent recurrence to fundamental principles is essential to the security of individual rights and the perfectibility of free government.

The Constitution of the Colorado River Indian Reservation (Article III, Section 2) states that "All members of the Colorado River Indian Tribes have certain inherent rights, namely the enjoyment of life, liberty, and the acquiring and ownership of possessions, and pursuing happiness and safety. These rights cannot be protected unless the members recognize their corresponding obligations and responsibilities." The preamble to the Constitution of the Fort Mojave Indian Tribe states that "We, the members of the Fort Mojave Tribe, in order to ... enjoy and maintain our rights and privileges as citizens under the Constitution and laws of the United States of America, do ordain and establish this Constitution and Bylaws ..."

The Constitution of the Chickasaw Nation states the basic right to alter or abolish forms of government, in these words: "All political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit, and they have at all times the inalienable right to alter, reform or abolish their form of government in such a manner as they may think expedient; provided, such action is taken pursuant to this Constitution."

The Constitution of the Yankton Sioux Tribe (Article IX) states that

> Section 1. All operations under this Constitution shall be free from any system of collectivism and/or socialism under any and all circumstances.
>
> Section 2. This Constitution shall stress to the fullest extent of its authority, at all times, recognition of and operation under the private enterprise system and democratic way of life.

Presumably, these provisions do not have much practical effect in delineating and protecting specific rights of individuals.

Tribal Rights

A number of constitutions state that the purpose of the document is to preserve tribal rights and/or a distinctive cultural inheritance. For example, the Constitution of the Confederated Tribes of Siletz Indians of Oregon (Article II) states that "Each duly enrolled member of the Confederated Tribes ... shall have the following rights: ... the right to exercise traditional rights and privileges of members of the Confederated Tribes ... where not in conflict with other provisions of this Constitution, tribal laws and ordinances, or the laws of the United States." The "Purposes" section of the same constitution says that the constitution is adopted and tribal government established "in order to: (1) Continue forever, with the help of God, our unique identity as Indians and as the Confederated Tribes ... and to protect that identity from forces that threaten to diminish it; (2) Protect our inherent rights as Indians and as a sovereign Indian tribe; (3) Promote our cultural and religious beliefs and to pass them on in our own way to our children, grandchildren, and grandchildren's children forever ..."

Article I, Section 1 of the Constitution of the Burns Paiute Indian Colony states that one of the purposes of the document is "To exercise and protect any individual or colony rights arising from any source including but not limited to tradition, Federal Statute, State Statute, common law, or otherwise."

The Constitution of the Crow Tribal Council states, in Section 8 of Article VII, that the Crow Tribe will make its own decisions "without Indian Bureau interference or advice..." and that "the Crow Tribal Council, regardless of same, hereby reserved [sic] unto itself the right to initiate moves looking to the protection of the Crow tribal rights and interests under their treaties and under the American constitution guaranteeing all basic human rights to all who live under the American flag, and to the equal protection of the laws of our country." Section 2, Article IV of the Constitution of the Fort Mojave Indian Tribe states that "The members of the Fort Mojave Tribe shall continue undisturbed in their customs, culture, and their religious beliefs including but not limited to, the customs of cremation, ceremonial dancing and singing, and no one shall interfere with these practices, recognizing that we have been a people and shall continue to be a people whose way of life has been different."

The Constitution (Article IV, Section 1) of the Spokane Indian Tribe states that "Every tribal member shall have ... the right to exercise traditional rights and privileges of members of the tribe, where not in conflict with other provisions of this Constitution, Tribal laws and ordinances, or the laws of the United States."

The Constitution of the Fort Sill Apache Tribe of Oklahoma, in Section 4 of Article VIII, refers to treaty rights, in these words: "The treaty rights of the Fort Sill Apache Tribe ... shall not in any way be altered, abridged or otherwise affected by any provision of this constitution and bylaws." The Prairie Band of Potawatomi Indians, in Article II of its Constitution, states that "We, the Prairie Band of Potawatomi, do not accept a diminishing of our sovereign status as a nation and of our vested and inherent rights by the act of adopting this constitution." Article I, the statement of Purpose of the Constitution of the Spokane Tribe, states that "Our purpose shall be to

promote and protect the sovereignty, rights, and interests of the Spokane Tribe of Indians."

Incorporation of the ICRA

Twenty-two tribal constitutions incorporate the Indian Civil Rights Act into the document, but do not go beyond it or change it in any way. For example, Article VIII of the Constitution of the Alturas Indian Rancheria states that "The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 ... against actions of a tribe in exercising its powers of self-government shall apply to the Alturas Indian Rancheria, its officers and all persons within its jurisdiction." Similar wording is found in the constitutions of 17 other tribes, with only minor variations (such as omitting "its officers and all persons within its jurisdiction.") Five constitutions accomplish the same thing by specifically listing the rights guaranteed by the Indian Civil Rights Act. For example, Article X of the Constitution of the Mississippi Band of Choctaw Indians states that the tribe, "in exercising powers of self-government shall not..." violate any of the specific rights spelled out in Title II. The Constitution of the Chitimacha Tribe of Louisiana states that Title II of the Civil Rights Act "shall apply where appropriate" to tribal members. The meaning of this qualification is not apparent.

Forty tribal constitutions incorporate the Indian Civil Rights Act into the document but go beyond this to add other guarantees. Most constitutions do not contain any language indicating the relationship between the ICRA guarantees and the other provisions, but the Apache Tribe of Oklahoma, in Section 4 of Article X of its Constitution, states that "The enumeration of any rights in this article shall not be interpreted to limit the rights otherwise guaranteed by the Civil Rights Act of 1968..." Similar language is contained in the constitutions of

the Delaware Tribe of Western Oklahoma and the Fort Sill Apache Tribe of Oklahoma. The Constitution of the Colorado River Indian Reservation (Section 3, Article III) says that members of the tribe are to have all rights secured by the United States Constitution "and such other rights as may be protected by effective legislation of the Congress of the United States of America." The Constitution of the Las Vegas Tribe of Paiute Indians contains a similar statement.

One constitution, that of the Pueblo of Isleta, makes changes in the Indian Civil Rights Act. Article III of this constitution reproduces the specific provisions of Title II but omits the provision guaranteeing a jury trial by at least six jurors where the penalty may involve imprisonment, changes the wording of the provisions in several minor ways which do not appear to change the meanings, and adds a provision denying to the Pueblo the right to "Enact any ordinances discriminating against individuals specifically named."

Guaranteeing Rights of other Citizens

Fifty-nine tribal constitutions contain language asserting that members of the tribe enjoy rights as citizens of the United States and/or a state and pledging that the constitution does not disturb these rights. For example, Article IX of the Constitution of the Alabama-Quassarte Tribal Town states that "This Constitution shall not in any way be construed to alter, abridge or otherwise jeapordize the rights and privileges of the members of the Tribal Town as citizens of the Creek Nation, the State of Oklahoma or of the United States." Another formulation of this provision is Article VIII of the Constitution of the Chehalis Reservation, which says that "No member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution and Statutes of the United States..." The Constitution of the Cherokee Nation of

Oklahoma (Article I) states that "The Constitution of the United States is the Superme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law." While not specifically referring to civil liberties, this statement would presumably include the guarantees of the Bill of Rights as law which the Cherokee Nation pledges itself not to violate. The Constitution of the Pueblo of Laguna (Section 1, Article VIII) states that "Each member of the Pueblo of Laguna is hereby assured of his rights as a citizen of the United States and no attempt shall be made by the Council or the officers of the Pueblo to enforce any order which shall deprive him of said rights." In 21 cases, a general statement of this nature is followed by a listing of specific rights which the tribe cannot violate, sometimes with the statement that the rights guaranteed by the United States or state constitutions shall not be violated, "including but not limited to" certain specified rights.

Reference to Rights not Named

The governing documents of six tribes parallel the wording of the 9th Amendment to the United States Constitution. For example, Section 3 of Article IV of the Constitution of the Jicarilla Apache Tribe says that "The enumeration of certain rights in this constitution shall not be construed to deny or disparage others retained by members of the Jicarilla Apache Tribe." Practically the same language is contained in constitutions of the Ak-Chin Indian Community, the Gila River Indian Community, and the Pueblo of Isleta, plus the Bylaws of the Salt River-Maricopa Indian Community. The Constitution of the Colorado River Indian Reservation combines such a declaration with a statement of basic philosophy. Section 1 of Article III of this constitution states that "All political power of the tribes is inherent in the members. This constitution

and bylaws is the expression of the will of the members and enumeration of rights and privileges herein shall not be construed to impair or deny others retained by the members."

Specific Rights

The provisions of tribal constitutions noted to this point have been general, not identifying specific rights of persons against tribal governments. Many tribal constitutions, however, either in addition to these more general references or without them, list specific rights which members and/or persons have against tribal governments. The number of such specific rights is less for almost all constitutions than for the United States Constitution, but the pattern of rights which authors of tribal constitutions saw fit to include in their documents is interesting.

1. First Amendment Rights

The most numerous specific guarantees are those protecting First Amendment rights. A total of 89 constitutions lists religious freedoms and freedoms of expression and association together, while there are numerous additional guarantees of First Amendment rights. Of the ones combining various First Amendment rights, there are several patterns. Thirty-seven constitutions contain a statement essentially the same as Section 1 of Article X of the Constitution of the Apache Tribe of Oklahoma, which states that "All members of the Apache Tribe of Oklahoma shall enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly and association." Another nine constitutions contain essentially the same wording except that "may" is substituted for "shall." Twenty-nine constitutions contain wording similar to Article VIII of the Constitution of the Chehalis Reservation, which states that "freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the

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right to petition for action or redress of grievances..." shall not be abridged by the tribal government. A number of constitutions provide an incomplete list of First Amendment rights. For example, the Constitution of the Burns Paiute Indian Colony, in Section 3 of Article X, lists "freedom of worship, speech, press and assembly" only, and the Constitution of the Sauk-Suiattle Indian Tribe (Article VIII) lists "freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances..." but not religious freedom.

Overall, a tabulation of specific First Amendment rights among the constitutions having a general First Amendment provision shows the following pattern:

Freedom of religion (and/or conscience and/or worship:	85
Freedom of speech and/or to speak:*	88
Freedom of the press or to write:*	56
Freedom of association and/or assembly, sometimes qualified with the word "orderly"	88
Freedom of petition (sometimes for redress of grievances)	34

*The Bylaws of the Salt River-Maricopa Indian Community (Section 3, Article IV) state that "Every member of the Salt River-Maricopa Indian Community may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

In addition to this general First Amendment provision, various other specific provisions of tribal constitutions apply to First Amendment freedoms. A number of provisions on religious freedom obviously were written specifically for the situation of the tribe. For example, several refer to traditional Native religious beliefs or practices. For example, Article VI of the Constitution of the Miccosukee Tribe states that "The members of the tribe shall continue undisturbed in their religious beliefs and nothing in this constitution and bylaws will authorize either the General Council or the Business Council to interfere with these traditional religious practices according to their custom." In a similar fashion, Article IX of the Constitution of the Seminole Tribe of Florida declares that "The members of the tribe shall continue undisturbed in their religious beliefs and nothing in this constitution and bylaws will authorize the

tribal council to interfere with these traditional religious practices according to their custom." The Constitution of the Sisseton-Wahpeton Sioux Tribe (Article IX) is practically identical with this provision.

On the other hand, several constitutional provisions which do not follow standard wording with regard to freedom of religion guarantee religious diversity. For example, Section 2 of Article VIII of the Constitution of the Pueblo of Laguna states that "All religious denominations shall have freedom of worship in the Pueblo of Laguna, and each member of the Pueblo shall respect the other members' religious beliefs." The Constitution of the Alabama-Quassarte Tribal Town (Article XI) states that "No member shall be treated differently because he does or does not believe in or take part in any religion or religious custom." Article VII of the Constitution of the Cocopah Tribe states that "The members of the tribe shall continue undisturbed in their religious beliefs and nothing in this Constitution will authorize the Tribal Council to interfere with religious practices." Section 7 of Article IV of the Constitution of the Gila River Indian Community of Arizona states that "Freedom of religion or conscience shall not be abridged," and Section 2 of Article IX of the Constitution of the Menominee Indian Tribe of Wisconsin forbids the Tribe to "make or enforce any law ... prohibiting the free exercise of religion or of the dictates of conscience..." An unusually detailed provision on religious freedom in Section 7 of Article IV of the Bylaws of the Salt River Pima-Maricopa Indian Community states the principle of religious freedom but limits it, in the following manner:

> The liberty of conscience secured by the provisions of this constitution and bylaws shall not be construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the Salt River-Maricopa Indian Community. Persons who are not members of the Salt River-Maricopa Indian Community may not act as missionaries or ministers of religion within the boundaries of the Salt River-Maricopa Indian Community except upon proof satisfactory to the community council that they are of good moral character and that their presence within the reservation will not disturb peace and good order.

A more limited but similar provision is part of the Constitution of the Cherokee Tribe of North Carolina. Section 18 of Chapter 207 of the Private Laws of North Carolina for 1897 states that "Free exercise of religion, worship and manner of serving God shall be forever enjoyed, but not contrued [sic] as to excuse acts of licentiousness."

The Indian Civil Rights Act does not contain a prohibition on the establishment of religion, because Congress recognized that some Native societies have governments which are inextricably intertwined with religious institutions. Nevertheless, a few tribal constitutions contain at least partial bans on established religions. The Constitution of the Menominee Indian Tribe of Wisconsin (in Section 2 of Article IX) states that the Tribe "shall not ... establish an official government religion..." The Constitution of the Chickasaw Nation (Section 3 of Article IV) states that "No religious test shall ever be required as a qualification for any office of public trust in this Nation," and this language is repeated almost exactly in Section 2 of Article IV of the Constitution of the Choctaw Nation of Oklahoma. Article IX of the Constitution of the Quechan Tribe requires that "The Council shall at all times be non-partisan and non-sectarian in character."

The one provision in a tribal constitution which can be construed as to some degree establishing a religion is part of Section 18 of Chapter 207 of the Private Laws of North Carolina for 1897, which serves as part of the constitution for the Cherokee Tribe of North Carolina. This section states that no person is eligible to an "office or appointment of honor, profit or trust" within the Tribe "who denies the existence of a God or a future state of rewards and punishments." However, the Bylaws of the Salt River-Maricopa Indian Community (Section 7 of Article IV) permit some support of religious activities, in these words:

> No public money shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment; but this shall not prevent the community council in its discretion from setting apart areas of tribal land for use rent free as sites of houses of worship or other religious activities. No religious qualifications shall be required for any public office or employment...

The same Bylaws (Section 7 of Article IV) contain a unique provision stating that no person shall be "incompetent as a witness or joror in consequence of his opinion on matters of religion nor be questioned touching his religious beliefs in any court of justice to affect the weight of his testimony."

Several constitutions have separate provisions dealing with various other First Amendment freedoms. The Constitution of the Chickasaw Nation (Section 4, Article IV) states that "Every citizen shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege, and no law shall ever be passed curtailing the liberty of speech, or of the press." Section 3 of Article IV of the Constitution of the Gila River Indian Community of Arizona states that "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Two constitutions restrict freedom of expression to tribal activities. The Constitution of the Choctaw Nation of Oklahoma (Section 3 of Article IV) states that "The right that every member has to speak, write or publish his opinions on matters relating to the Choctaw Nation shall never be abridged," and Section 10 of Article VII of the Constitution of the Crow Tribal Council states that "Every member of the Crow Tribe, outside of the exception herein provided for, shall have equal opportunities to discuss any and every question of tribal concern before the council, and to participate, without interference, in all votes taken upon any such questions." (The council is the entire Tribe, but it is not clear what the "exception" is.)

The constitutions of the Chickasaw Nation and the Choctaw Nation of Oklahoma contain virtually identical provisions to the effect that "The citizens shall have the right, in a peaceable manner, to assemble together for their common good and to apply to those vested with powers of government, for redress of grievances or other purposes by address or remonstrance." (Section 5, Article IV of the Chickasaw Constitution; the corresponding Choctaw provision is Section 4 of Article IV.)

A unique provision regarding freedom of speech appears in the Constitution of the Quechan Tribe; Section 2 of Article IX of this constitution states that "Nothing herein stated in this article shall serve to prevent the exercise of free speech and action in any matter not having to do with the deliberations of the Council."

The Constitution of the Gila River Indian Community of Arizona contains a unique provision (in Section 6 of Article IV) to the effect that "All elections shall be free and equal, and no power shall at any time interfere to prevent the free exercise of the right of suffrage." (A number of constitutions include provisions specifying who may vote in tribal elections in Bills of Rights; these have not been included here because they do not directly create rights of individuals against tribal governments. However, they do so indirectly, since a failure to allow a tribal member to vote who met constitutional qualifications would constitute a violation of the constitution.)

2. Guarantees of Equality

After First Amendment rights, guarantees of equality are most common in tribal constitutions. A total of 73 tribal constitutions contains some guarantee of equality, usually more detailed than the equal protection phrase of the Indian Civil Rights Act and the 5th and 14th Amendments to the United States Constitution. A guarantee of "equal protection of the laws" occurs in 11 constitutio

however, the Constitution of the Menominee Indian Tribe of Wisconsin (Section 2 of Article IX) qualifies this by saying "this clause shall not be interpreted to grant to non-tribal members those rights and benefits to which the tribal members are entitled by virtue of their membership in the Tribe."

Twenty-seven constitutions contain a provision for equality of economic participation in tribal activities, of which Section 2 of Article VIII of the Constitution of the Blackfeet Tribe is typical: "All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the reservation." A very similar statement, but including "political rights," is found in eleven constitutions. An example of this approach is Article VII of the Constitution of the Cocopah Tribe, which reads: "All members of the tribe shall be accorded equal political rights and equal opportunities to participate in the economic resources and activities of the tribe." Still another very similar provision is found in six constitutions, of which Article VIII of the Constitution of the Ely Indian Colony is an example: "All members of the Ely Indian Colony shall have equal rights, equal protection, and equal opportunity to participate in the economic resources, tribal assets, and activities of the Colony." Still another form of such a constitutional provision guarantees life, liberty or pursuit of happiness to members. Three constitutions contain such clauses.

Twelve more constitutions contain a provision essentially like Article X of the Constitution of the Absentee-Shawnee Tribe of Indians of Oklahoma, which states: "All members of the ... Tribe ... shall be accorded equal rights pursuant to tribel law."

Finally, several other constitutions contain pledges of economic equality more specific than any of those cited above. For example, Section 7 of Article III of the Constitution of the Cheyenne-Arapaho Tribes of Oklahoma states that:

"All enrolled members of the tribes shall be eligible for all rights, privileges, and benefits given by this constitution and by-laws, such as claims, credits, acquisition of land, all educational grants, and any other future benefits." The Constitution of the Pueblo of Santa Clara, in Section 1 of Article VII, states that "all lands of the pueblo ... shall forever remain in the pueblo itself and not in the individual members thereof" but that "All the members of the pueblo are declared to have an equal right to make beneficial use, in accordance with ordinances of the council, of any land of the pueblo which is not heretofore or hereafter assigned to individual members."

A provision which seems to be a negative kind of guarantee of equality is Section 5 of Article IV of the Bylaws of the Salt River-Maricopa Indian Community, which reads: "No law granting irrevocably any privilege, franchise, or immunity shall be enacted."

A number of the equality provisions allow for exceptions specified in the constitution. For instance, the Constitution of the Lovelock Paiute Tribe (Article IX) guarantees "equal rights, equal protection and equal [economic] opportunity" "except as provided in Article VII, Section 2." This section refers to assignment of tribal lands and states that "preference shall be given first to members of the ... Tribe who are heads of household..."

3. Protection for Property Rights

Protection for individual property rights, in some cases specifically allotted lands, is provided for in thirty-five constitutions. In fourteen cases, the wording of the provision is essentially the same as Article IX of the Constitution of the Alabama-Quassarte Tribal Town, which reads: "The individual vested property rights of any member of the Tribal Town shall not be altered, abridged, or otherwise affected by the provisions of this Constitution and By-Laws without the consent of such individual member." Another fifteen constitutions contain

essentially the same wording except for omission of the word "vested." Other provisions saying essentially the same thing include Section 2 of Article III of the Constitution of the Cheyenne-Arapaho Tribes of Oklahoma, which declares that "Individual rights in allotted and inherited lands shall not be disturbed by anything contained in this constitution and by-laws," by Section 7, Article II of the Constitution of the Santee Sioux Tribe, which states that "Nothing contained in this article shall be construed to deprive any Santee Sioux Indian of any vested right," and by Section 2 of Article II of the Constitution of the Tule River Indian Tribe of California, which states that the Council has the authority to provide for future memberships and adoption into the Tribe, "provided that property rights shall not be changed by any action under this section." Section 3 of Article IV of the Constitution of the Yankton Sioux Tribe provides that "All allotted lands including heirship lands, belonging to any member of the Yankton Sioux Tribe ... shall continue to be held as heretofore by their present owners... The rights of the individual Indians to hold their lands under existing law shall not be affected by anything contained in this Constitution and By-Laws." Further, Section 4 of the same article provides that "In the process of negotiating a lease all heirs shall be notified thereby indicating rights will not be violated."

Finally, two constitutional provisions require tribal governing bodies, in making assignments of tribal land, to respect individual property rights. Article X of the Constitution of the San Carlos Apache Tribe states that tribal land may not be allotted to individuals "but assignment of land for private use may be made by the council in conformity with ordinances which may be adopted on this subject, provided, that the rights of all members of the tribe be not violated.". Almost identical is Article VIII of the Constitution of the Southern Ute Indian Tribe.

4. Due Process of Law

Due process of law is guaranteed by 33 constitutions. In all but five cases, the constitutions merely say that "no person shall be denied ... due process of law." In the cases of the Gila River Indian Community and the Rosebud Sioux Tribe the terminology is the same as that of the Due Process clauses of the United States Constitution: "No person shall ... be deprived of life, liberty, or property without due process of law." The Constitution of the Skokomish Indian Tribe (Article IX) refers only to "liberty" and "property," while the Bylaws of the Salt River-Maricopa Indian Community (Section 1 of Article IV) state that "No persons shall be deprived of life, liberty or property, or be expelled from the Salt River-Maricopa Indian Community without due process of law." Section 2 of Article IX of the Constitution of the Menominee Indian Tribe of Wisconsin states that the Tribe will not "Deprive any person of liberty or property (1) without fully complying with procedural processes of tribal law or (2) application of tribal laws which have no reasonable relation to the purpose for which they were enacted."

5. Discrimination by Gender

No constitution prohibits discrimination by sex, but one constitution prohibits discrimination by sex in filling tribal offices. Section 4 of Article IV of the Constitution of the Sac and Fox Tribe of the Mississippi in Iowa states that "No person shall be disqualified on account of sex from holding any office created by this Constitution."

Four tribal constitutions discriminate by gender in establishing membership in the tribe. Section 4 of Article II of the Constitution of the Cachil Dehe Band of Wintun Indians provides that "If a female member marries a non-Indian, she will automatically lose her membership and will be required to leave the Community within ninety days after written notice has been served upon her by the Business

Committee: Provided, That the provisions shall not apply in the case of any marriages consummated prior to the approval of this Constitution and By-Laws." Section 1 of Article II of the Constitution of the Hopi Tribe of Arizona provides that members shall be those on a tribal roll taken in 1937, those born of mothers and fathers who were on this roll, and "All children born after December 31, 1937, whose mother is a member of the Hopi Tribe, and whose father is a member of some other tribe." Section 3 of Article III of the Constitution of the Kiahlagee Tribal Town provides that "All adult offspring of a marriage between a male member of the Kiahlagee Tribal Town or Tribe may become members of the Town by applying for admission, when accepted and approved by a majority vote of the members present at any regular Kiahlagee Tribal Town membership meeting." One of the categories of possible membership in Laguna Pueblo, as stated in Section 1 of Article II of the Constitution of the Pueblo, is "All persons of one-half or more Laguna Indian blood born after approval of this revised Constitution: (1) whose mother is a member of the Pueblo of Laguna; or (2) whose father is a member of the Pueblo of Laguna, provided the child is born in wedlock."

Two constitutions discriminate by gender in setting minimum ages for voting in tribal elections. Article III of the Constitution of the Crow Tribal Council states that "Any duly enrolled member of the Crow Tribe, except as herein provided, shall be entitled to engage in the deliberations and voting of the council, provided the females are 18 years old and the males 21 years." A resolution of the Quapaw Tribe adopted in 1956, which functions as its constitution, states that "it is the desire of the individual male members, 21 years of age and over, and female members, 18 years of age and over, to establish a responsible administrative body to represent speak and act for the individual members of the Quapaw Tribe on matters affecting the properties and general

business of the Tribe." Presumably this language specifies the voting rules for the Tribe.

6. Rights of the Accused

A relatively small number of constitutions provide explicitly for rights of the accused. One form of a provision in this area, which is essentially the same in four other constitutions, is Section 4 of Article VII of the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, which reads:

> Any member of the Confederated Tribes accused of any offense shall have the right to a prompt, open, and public hearing with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf and trial by jury shall be accorded, when duly requested, by any member accused of any offense punishable by more than 30 days' imprisonment, and excessive bail or cruel or unusual punishment shall not be imposed.

Essentially the same provision, except that "Trial by jury may be demanded" is substituted for "trial by jury shall be accorded, when duly requested," is found in eight constitutions. These provisions set different penalties which will require a jury trial; in ten cases, a jury trial is required if an offense is punishable by more than 30 days' imprisonment, in two cases trial is required if punishment may exceed 30 days' imprisonment or a fine of $45, and in one case trial by jury is required if the punishment exceeds 60 days' imprisonment or $45. Section 2 of Article X of the Constitution of the Rosebud Sioux Tribe states that "Any Indian accused of any offense shall have the right to the assistance of counsel and to demand trial by jury." Also, criminal defendants have the right to "a speedy and public trial." Section 2 of Article IX of the Constitution of the Menominee Indian Tribe of Wisconsin provides a right to a jury trial of not less than six members for anyone accused of a "major offense" as defined in the Bylaws of the Tribe, but the person accused must request the trial and must pay the expenses of the trial if the penalty for the offense

does not include the possibility of imprisonment. Section 3 of Article III of the Constitution of the Colorado River Indian Tribes of the Colorado River Indian Reservation guarantees the rights enjoyed under the United States Constitution, including the right to "expeditious trial after legal indictment or charge with opportunities for bail and protection against excessive punishment..." Section 5 of Article IV of the Constitution of the Gila River Indian Community of Arizona provides that "Justice in all cases shall be administered openly, and without unnecessary delay." The Constitution of the Menominee Indian Tribe of Wisconsin essentially repeats the protections for persons accused of crime in the sixth paragraph of Title II of the Indian Civil Rights Act, but with slightly different wording. The Bylaws of the Salt River-Maricopa Indian Community provide, in Section 8 of Article IV, that "Excessive bail shall not be required, no excessive fines imposed, nor cruel or unusual punishment inflicted." Section 10 of this Article provides that "All persons charged with crime shall be bailable by sufficient sureties." Section 11 of the same article provides a more complicated set of guarantees for the accused, with some significant variations from the pattern of the Indian Civil Rights Act. This provision states that

> In prosecutions for offenses against the Salt River-Maricopa Indian Community, the accused shall have the right to appear and defend in person and to have some member of the Salt River-Maricopa Indian Community act as his counsel, to be informed of the nature and cause of the accusation against him, to testify in his own behalf, and to have a speedy public trial; and in no instance shall any accused person be compelled to advance money or fees to secure the rights herein guaranteed.

Two constitutions protect a right of privacy. Section 4 of Article IV of the Constitution of the Gila River Indian Community of Arizona states that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law," while Section 4 of Article IV of the Bylaws of the Salt River Pima-Maricopa Indian Community states that "No person shall be disturbed in his

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private affairs or his home invaded without authority of law." The Constitution of the Menominee Indian Tribe of Wisconsin provides elaborate protections against illegal searches and seizures, in this provision, which prohibits the Tribe to

> permit searches and seizures unless a Tribal Court issues a warrant upon a sworn statement presented to the Tribal Court showing reasonable grounds to believe that an offense against tribal law has been committed and that the person or place to be searched holds evidence of the offense or that the person to be seized committed the offense; or that the thing to be seized is evidence of the offense, and describing specifically the person or place to be searched or the person or thing to be seized; provided that, searches and seizures may be permitted without a warrant where justified by compelling circumstances as shall be defined by ordinance.

The privilege against self-incrimination is guaranteed by only three governing documents, the constitutions of the Rosebud Sioux Tribe and the Menominee Indian Tribe of Wisconsin plus the Bylaws of the Salt River-Maricopa Indian Community. The Menominee provision (Section 2 of Article IX) states that

> In any criminal proceeding against any person, [the Tribe shall not] compel such person to be a witness against the person's own interest including any instance where the person's testimony reasonably might lead to the institution of criminal proceedings against that person.

The protection against double jeapordy is provided only by the same three governing documents. Only the Constitution of the Blackfeet Tribe (Section 4 of Article VIII) states that anyone accused of a crime shall have "the right to a bond," and only the Constitution of the Menominee Indian Tribe of Wisconsin (Section 2, Article IX) and the Bylaws of the Salt River-Maricopa Indian Community prohibit "excessive fines."

7. Miscellaneous Provisions

There are a number of provisions protecting civil liberties which are found in such small numbers of constitutions that they must be grouped together.

Six constitutions provide a right of tribal members to examine tribal records. Section 4 of Article X of the Constitution of the Cold Springs Rancheria states that "Tribal members shall have the right to review all tribal records, including

financial records, at any reasonable time in accordance with procedures established by the tribal council." The other provisions on this topic are essentially the same except that two of them omit the phrase "including financial records," and two omit the word "all."

Only two governing documents provide for just compensation for the public taking of private property. Section 28 of Chapter 207 of the Private Laws of North Carolina for 1897, the governing document for the Cherokee Tribe of North Carolina, states that the council may "appropriate to school, church or other public purposes for the benefit of the band..." land owned by the band and occupied by individuals, but if it does so, it is required to pay just compensation to the owner for "improvements and betterments" on the land, as determined by a jury of not less than six members. The section outlines various details of the procedure which must be followed in such trials to determine the amount of compensation. Section 9 of Article IV of the Bylaws of the Salt River-Maricopa Indian Community provides that

> Private property shall not be taken for public or private use except for public ways of necessity, and for drains, flumes, or ditches, on or across from the lands of others for mining, agricultural, domestic, industrial, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or deposited to the credit of the owner.

Two constitutions and the bylaws of a tribe prohibit bills of attainder. The Constitution of the Menominee Indian Tribe of Wisconsin (Section 2 of Article IX) forbids the Tribe to "Enact any law imposing punishment on one person," and Article III of the Constitution of the Pueblo of Isleta states that the council may not "Enact any ordinances discriminating against individuals specifically named." Section 12 of Article IV of the Bylaws of the Salt River-Maricopa Indian Community states that "No bill of attainder ... shall ever be enacted."

Three governing documents have specific provisions against ex post facto laws. Section 8 of Article V of the Constitution of the Cherokee Nation of Oklahoma states that "No laws passed by the Council shall have retroactive effect or operation," and Section 2 of Article IX of the Constitution of the Menominee Indian Tribe of Wisconsin says that the Tribe shall not "enact any law which makes an action a crime which was not a crime when such action was committed, or which increases the punishment for a crime committed before the effective date of the law, or which deprives a person in any accusatory proceeding of any substantial right or immunity to which the person was entitled before the effective date of the law." Section 12 of Article IV of the Bylaws of the Salt River-Maricopa Indian Community provides that "No ... expost-facto law ... shall ever be enacted."

The Salt River-Maricopa Indian Community is unique in prohibiting laws impairing the obligation of a contract. Section 12 of Article IV of the Bylaws of this tribe states that "No ... law impairing the obligation of a contract shall ever be enacted."

The Zuni Tribe (Section 1 of Article III of its Constitution) is alone in guaranteeing that "no member shall be denied ... the right to bear arms."

One constitution embodies protections for employees in the constitution. Section 6 of Article IV of the Constitution of the Chickasaw Nation states that "No employee having served in a position for at least one (1) year shall be removed from employment of the Chickasaw Nation except for cause. The employee shall be given a hearing under the rules and procedures prescribed by the Tribal Council."

CONCLUSIONS

The problem of providing protections for civil liberties against tribal councils is unique in the American polity because of the necessity to balance the right to a culturally different self-governing existence of tribal societies against such protections. My view is that "the right to be different" should continue to be recognized by our legal system, and indeed should be acknowledged to have a constitutional basis, rooted in the history of Native American-EuroAmerican interaction and the necessity to protect religious freedom. Consequently, even though human rights have a universal character, a civil libertarian cannot simply advocate that the protections for civil liberties against tribal action should be exactly the same as they are for individuals against action by the national and/or state (including local) governments. The necessity to protect both types of liberties to the maximum extent possible has been recognized by the American Civil Liberties Union, which has as its sole objective the advancement of individual liberty. The ACLU "supports the rights of Indian peoples to: 1) A tribal land base and appurtenant natural resources; 2) Tribal self government; 3) Retention of their cultural and religious heritage and; 4) Enforcement of the commitments made to them by the United States in treaties, compacts, and by other governmental actions." At the same time, the ACLU recognizes "the right of all individuals to be free from governmental abuse of power, whether the offending government be federal, state, or tribal." Consequently, when dealing with civil liberties complaints against tribal governments, "the ACLU must remain sensitive to, and be prepared to defend, the needs of the tribe, which needs are expressed in the statement of general policy [quoted above.] Thoughtful investigation of the countervailing interests must precede any action which may affect basic tribal values and institutions." In my judgement, this general position is one which should be adopted by all civil libertarians.

The examination of provisions in tribal constitutions relating to civil liberties leads to a few conclusions relevant to the problem of maximizing both the tribal right and the rights of individuals affected by tribal actions. First, while there are relatively few constitutions which explicitly state that Native cultures are

different from the culture of the general American society, there is evidence in these provisions of the existence of such differences. When both the general statements of the need to preserve tribal cultures and the provisions dealing with religious freedom are examined, it is clear that many tribes assert "the right to be different." Furthermore, the very large emphasis on provisions guaranteeing equality and the nature of the provisions dealing with rights of the accused both clearly reflect societal values which emphasize different values than those of the general American society. At the same time, most tribal constitutions do not contain anything which suggests that the rights which the members of these societies are claiming are different from the rights of other Americans.

One type of provision regarding civil liberties might undermine claims of cultural difference. This is the provision which states that all members of the tribe are to have the same rights as all other American citizens or as non-Indian citizens. While it is not known how these provisions have been interpreted, they would seem on their face to incorporate the Bill of Rights of the United States and/or state constitutions into tribal constitutions. If this interpretation is followed by the courts, 59 tribal constitutions contain a provision which could be used to apply against tribal governments the full panoply of individual liberties, without even the modifications made by the Indian Civil Rights Act. Such a result could be a serious threat to "the right to be different."

Few tribal constitutions recognize explicitly any difference between the rights enjoyed by members and those enjoyed by non-members. It is probably crucial for the survival of such societies that they be able to control the rules establishing membership in the society and that they be able to engage in economic practices which are not those of the surrounding society, among other things. Failure to state a tribal right to treat members differently from non-members in several areas could lead to serious difficulties for Native American societies in the future. At the same time, there would appear to be a need to reassure that the rights of non-members, though different in some respects from the rights of members, will be respected and protected by tribal governments.

Probably the most important issue regarding civil liberties in the tribal setting is the question of the nature of the remedies available to individuals, Indian or non-Indian, who believe that their rights have been violated by tribal governments. The decision of the United States Supreme Court in the Martinez case has prevented a result which could have been disastrous for tribal self-government; few tribes, if any, could afford the legal support necessary to deal adequately with the possible ramifications of a holding that tribes may be sued without their consent or that individuals challenging tribal actions are entitled to use all of the weapons fashioned by Congress and the judiciary to defend individual rights through litigation. Probably no Native societies could avoid having their governmental-legal systems remade in the image of the general society were they to be subjected to the type of legal assault that could result from wrong decisions regarding the question of remedies. At the same time, it seems clear that habeas corpus suits alone are an inadequate means of protecting civil liberties.

One of the important questions here is the nature of tribal mechanisms for correcting abuses by governments. Tribal courts are being increasingly studied, but the thorough evidence for meaningful conclusions regarding the adequacy of the courts to protect civil liberties while not undermining tribal cultures does not seem to exist. It should also be kept in mind that tribal constitutions contain many other mechanisms for protecting against abuses of authority, ranging from specific appeals procedures for persons who wish to appeal membership decisions through elaborate means of recalling tribal officials to the devices of direct legislation - the initiative and the referendum. A full study of the way by which tribal constitutions protect individual liberties would have to include some attention to these various devices, as well as to tribal courts.

One of the largest gaps in our knowledge of the state of civil liberties on Indian reservations is that we do not know the extent of the problem; that is, we do not know how often tribal councils violate individual liberties in ways which should be prevented or corrected. The extensive investigations which led to passage of the Indian Civil Rights Act, surprisingly, do not provide much hard evidence on this question. Much of the testimony at these

hearings was general in nature, dealing with the means to protect civil liberties or the relationship between the tribal right to exist and individual rights; specific evidence of actual abuses of tribal authority is rare. Moreover, these hearings dealt also with several other questions unrelated to civil liberties for individuals, such as the question of state jurisdiction over reservations. Nothing like a quantitative estimate of the extent of civil liberties abuses at the time of these hearings is possible; moreover, the hearings were concluded years ago.

Given these conclusions, some recommendations may not be entirely out of place. Human rights are the concern of all, and also the right to tribal existence should be the concern of all. The following recommendations are offered in the hope that they may help advance both liberties.

1. Native Americans themselves, perhaps with assistance from one of the existing national Indian organizations (such as the National Congress of American Indians or the National Tribal Chairmen's Association) should undertake a serious study of how to strengthen constitutional protection for individual liberties without undermining tribal self-government. Such a study should pay special attention to two governing documents, the Constitution of the Menominee Indian Tribe of Wisconsin and the Bylaws of the Salt River-Maricopa Indian Community, which contain unusually detailed bills of rights but which are also obviously adapted to the circumstances of Native cultures. Such a review should consider:

a. Advising more tribes to include in their constitutions statements that tribal members wish to preserve their cultural distinctiveness. The statement of Purposes of the Siletz Indians of Oregon and the more detailed specification of religious rights by the Constitution of the Fort Mojave Tribe might be considered as models.

b. Considering whether blanket incorporation of all constitutional rights of non-Indians is wise.

c. Being more explicit about rights of members as against rights of non-members, and extending explicit protection to non-members in a manner which will not weaken tribal autonomy.

d. Developing a tribally-developed alternative to the model code of criminal procedure which the Interior Department is

supposed to be developing.

2. Indians and friends of Indians concerned with civil liberties should seek some way to survey the state of civil liberties on reservations today. Besides documenting the extent to which civil liberties violations are now occurring, the study could identify the areas which provide the most difficulty, both from a civil liberties viewpoint and from the standpoint of tribal autonomy, and could identify tribes with especially good civil liberties records, to determine why this is so. The study should include traditional societies operating without benefit of written governing documents as well as those whose constitutional provisions were reported here.

3. The question of providing remedies beyond the writ of habeas corpus for civil liberties violations should be explored carefully by Native societies. Development of remedies which would not interfere with cultural distinctiveness or the right of self-government would help reassure non-Indians and reduce the chance of Congressional extension of remedies some day.

4. The Supreme Court, in the Martinez case, suggested that the Bureau of Indian Affairs might use its authority as trustee for tribes to protect civil liberties of individuals. Attempts by the Bureau to move in this way have resulted in charges of paternalism, but the idea is still worth studying. The Bureau appears to be increasingly staffed by Indians at top as well as low levels and therefore may be more sympathetic with the right of Native Americans to be culturally different than was the case previously.

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